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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 VIRGINIA GUTIERREZ,) NO. ED CV 15-889-E
12 Plaintiff,)
13 v.) **MEMORANDUM OPINION**
14 CAROLYN W. COLVIN, ACTING) **AND ORDER OF REMAND**
15 COMMISSIONER OF SOCIAL SECURITY,)
16 Defendant.)
17

18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
20 judgment are denied and this matter is remanded for further
21 administrative action consistent with this Opinion.
22

23 **PROCEEDINGS**
24

25 Plaintiff filed a complaint on May 6, 2015, seeking review of the
26 Commissioner's denial of disability benefits. The parties filed a
27 consent to proceed before a United States Magistrate Judge on
28 July 13, 2015. Plaintiff filed a motion for summary judgment on

1 November 6, 2015. Defendant filed a cross-motion for summary judgment
2 on December 7, 2015. The Court has taken the motions under submission
3 without oral argument. See L.R. 7-15; "Order," filed May 11, 2015.

4
5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
6

7 Plaintiff asserts disability since November 9, 2009, based on a
8 combination of alleged impairments (Administrative Record ("A.R.") 65-
9 84, 200-01, 206-07, 249). An Administrative Law Judge ("ALJ") found
10 Plaintiff suffers from several severe "medically determinable
11 impairments," including "severe left ear hearing loss with fluctuating
12 hearing in the right ear" (A.R. 27). In defining Plaintiff's supposed
13 residual functional capacity, however, the ALJ failed to include any
14 hearing limitation (A.R. 29). Similarly, in framing hypothetical
15 questions for the vocational expert, the ALJ failed to mention
16 Plaintiff's severe hearing impairment (A.R. 91). In at least partial
17 reliance on the vocational expert's testimony, the ALJ found that a
18 person having Plaintiff's supposed residual functional capacity could
19 perform all of Plaintiff's past relevant work (A.R. 32). The Appeals
20 Council denied review (A.R. 1-5).

21
22 **STANDARD OF REVIEW**
23

24 Under 42 U.S.C. section 405(g), this Court reviews the
25 Administration's decision to determine if: (1) the Administration's
26 findings are supported by substantial evidence; and (2) the
27 Administration used correct legal standards. See Carmickle v.
28 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,

1 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
2 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
3 relevant evidence as a reasonable mind might accept as adequate to
4 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
5 (1971) (citation and quotations omitted); see also Widmark v.
6 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

7
8 If the evidence can support either outcome, the court may
9 not substitute its judgment for that of the ALJ. But the
10 Commissioner's decision cannot be affirmed simply by
11 isolating a specific quantum of supporting evidence.
12 Rather, a court must consider the record as a whole,
13 weighing both evidence that supports and evidence that
14 detracts from the [administrative] conclusion.

15
16 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and
17 quotations omitted).

18 19 DISCUSSION

20
21 As the ALJ expressly acknowledged, "[a]n impairment or
22 combination of impairments is 'severe' within the meaning of the
23 regulations if it significantly limits an individual's ability to
24 perform basic work activities" (A.R. 26). See 20 C.F.R. §
25 404.1520(c); 20 C.F.R. § 416.920(c). Here, the ALJ erred by defining
26 a residual functional capacity that failed to comprehend the
27 necessarily significant work-related limitations caused by Plaintiff's
28 severe hearing impairments. See, e.g. Spurling v. Commissioner, 2009

1 WL 1393369, at *12 (N.D. W. Va. May 14, 2009) (ALJ erred where "[t]he
 2 ALJ did not include any limitation in his RFC for Plaintiff's hearing
 3 loss even though he found it to be a severe impairment").¹ The ALJ
 4 similarly erred by failing to mention any hearing limitation in the
 5 hypothetical questions posed to the vocational expert. See DeLorme v.
 6 Sullivan, 924 F.2d 841, 850 (9th Cir. 1991) (hypothetical question to
 7 the vocational expert must "set out all of the claimant's
 8 impairments"); accord Gamer v. Secretary, 815 F.2d 1275, 1280 (9th
 9 Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984).

10
 11 Defendant appears to argue that any error was harmless, positing
 12 that Plaintiff's hearing limitations assertedly would not impact her
 13 past relevant work as a "customer service representative." This
 14 argument must be rejected. On the present record, substantial
 15 evidence does not support the conclusion Plaintiff could perform her
 16 work as a "customer service representative" notwithstanding her severe
 17 hearing impairments.

18
 19 ¹ At one point in the ALJ's decision, the ALJ appears to
 20 backtrack on the earlier finding of severe medically determinable
 21 hearing impairments (A.R. 30) ("the claimant has not provided
 22 evidence in the form of audiogram testing to establish the
 23 existence of a severe medically determinable hearing
 24 impairment"). To the extent that the ALJ's decision is
 25 inconsistent or ambiguous on the issue of whether Plaintiff has
 26 any significant hearing-related limitation, remand would be
 27 required to clarify the decision. See Regennitter v.
 28 Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999) (an ALJ's
 inaccurate characterization of the record, when material,
 warrants remand); Rodriguez v. Astrue, 2011 WL 1103119, at *9
 (E.D. Cal. March 22, 2011) ("remand for further proceedings is
 proper due to the ambiguity of the ALJ's decision . . ."); Mingo
v. Apfel, 1998 WL 373411, at *2 (D. Kan. July 1, 1998) (remand
 necessary where the Administration conceded the ALJ's findings
 were internally inconsistent).

1 Although the claimant has the burden of proving an inability to
2 perform his or her past relevant work, "the ALJ still has a duty to
3 make the requisite factual findings to support his [or her]
4 conclusion." Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001).
5 The incompleteness of the hypothetical questions posed to the
6 vocational expert in the present case prevents that expert's testimony
7 from furnishing substantial evidence that Plaintiff can perform her
8 past relevant work. See DeLorme v. Sullivan, 924 F.2d at 850; Gamer
9 v. Secretary, 815 F.2d at 1280; Gallant v. Heckler, 753 F.2d at 1456.
10 An ALJ need not always consult a vocational expert to help determine
11 whether a claimant can perform the claimant's past relevant work. See
12 Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993); Miller v.
13 Heckler, 770 F.2d 845, 850 (9th Cir. 1985). However, "[t]o determine
14 whether a claimant has the residual capacity to perform his [or her]
15 past relevant work, the [Administration] must ascertain the demands of
16 the claimant's former work and then compare the demands with his [or
17 her] present capacity." Villa v. Heckler, 797 F.2d 794, 797-98 (9th
18 Cir. 1986); see 20 C.F.R. § 404.1520(e).

19
20 In finding that an individual has the capacity to perform a past
21 relevant job, the determination or decision must contain among the
22 findings the following specific findings of fact:

23
24 1. A finding of fact as to the individual's RFC
25 [residual functional capacity].

26
27 2. A finding of fact as to the physical and mental
28 demands of the past job/occupation.

1 3. A finding of fact that the individual's RFC would
2 permit a return to his or her past job or occupation. SSR
3 82-62 (emphasis added).

4
5 See Dealmeida v. Bowen, 699 F. Supp. 806, 807 (N.D. Cal. 1988).

6
7 In making these findings, the ALJ must conduct a searching
8 inquiry and analysis.

9
10 The decision as to whether the claimant retains the
11 functional capacity to perform past work which has current
12 relevance has far-reaching implications and must be
13 developed and explained fully in the disability decision.
14 Since this is an important and, in some instances, a
15 controlling issue, every effort must be made to secure
16 evidence that resolves the issue as clearly and explicitly
17 as circumstances permit.

18
19 Reasonable inferences may be drawn, but presumptions,
20 speculations and suppositions must not be used. SSR 82-62.

21
22 Evidence concerning the hearing-related demands of Plaintiff's
23 past relevant work (including Plaintiff's past relevant work as a
24 "customer service representative") is sparse or non-existent on the
25 present record. The ALJ's failure to inquire further regarding these
26 demands constituted error. See SSR 82-62; see also Burkhart v. Bowen,
27 856 F.2d 1335, 1341 (9th Cir. 1988) (Administration may not speculate
28 concerning the requirements of particular jobs); Brown v. Heckler, 713

1 F.2d 441, 443 (9th Cir. 1983) ("the ALJ has a special duty to fully
2 and fairly develop the record and to assure the claimant's interests
3 are considered . . .").

4
5 The Court is unable to conclude that the above-discussed errors
6 were harmless. See Treichler v. Commissioner, 775 F.3d 1090, 1105
7 (9th Cir. 2014) ("Where, as in this case, an ALJ makes a legal error,
8 but the record is uncertain or ambiguous, the proper approach is to
9 remand the case to the agency"); Garcia v. Commissioner, 768 F.3d 925,
10 932-34 (9th Cir. 2014) (a failure to develop the record is not
11 harmless unless it is "clear from the record" that the error was
12 "inconsequential to the ultimate nondisability determination"; citing
13 Tommasetti v. Astrue, 533 F.3d 1035 (9th Cir. 2008)); see also McLeod
14 v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not harmless where
15 "the reviewing court can determine from the 'circumstances of the
16 case' that further administrative review is needed to determine
17 whether there was prejudice from the error").

18
19 Remand is appropriate because the circumstances of this case
20 suggest that further administrative review could remedy the ALJ's
21 errors. McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura,
22 537 U.S. 12, 16 (2002) (upon reversal of an administrative
23 determination, the proper course is remand for additional agency
24 investigation or explanation, except in rare circumstances); Dominguez
25 v. Colvin, 2015 WL 8600040, at *3 (9th Cir. Dec. 14, 2015) ("Unless
26 the district court concludes that further administrative proceedings
27 would serve no useful purpose, it may not remand with a direction to
28 provide benefits"); Treichler v. Commissioner, 775 F.3d at 1101 n.5

(remand for further administrative proceedings is the proper remedy
"in all but the rarest cases").

CONCLUSION

For all of the foregoing reasons,² Plaintiff's and Defendant's
motions for summary judgment are denied and this matter is remanded
for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 4, 2016.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

² The Court has not reached any other issue raised by
Plaintiff except insofar as to determine that reversal with a
directive for the immediate payment of benefits would not be
appropriate at this time. "[E]valuation of the record as a whole
creates serious doubt that [Plaintiff] is in fact disabled."
See Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014).